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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 206

MRS. ROBERT F. CALLAWAY, ET AL., PETITIONERS,

v.

W. L. GARBER AND UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (Pet. App. i; R. 17-21)[1] is not reported. The opinion of the court of appeals (Pet. App. vii) is reported at 289 F. 2d 171.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1961. The petition for a writ of certiorari

[1] All record references are to the pages of the "Transcript of Record" printed for the use of the court of appeals and filed here pursuant to Rule 21 of this Court.

was filed on July 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly found that the death of a serviceman, while he was on a military mission and traveling under compulsion of orders from his commanding officer, was incident to his military service and [illegible] would not furnish a basis for a tort action against the United States under the Federal Tort Claims Act.

STATUTE AND REGULATIONS INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows (28 U.S.C. 1346(b), 2674):

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

The Joint Travel Regulations for the Uniformed Services, paragraphs 4200, 4203(3)(a), 4203(b)(1), and

STATEMENT

On May 3, 1957, W. L. Garber, a Chief Petty Officer in the United States Navy who was assigned to duty as a recruiting officer, was operating his own automobile in a westerly direction on a highway in Broadwater County, Montana. As he was thus proceeding, Garber negligently drove his automobile into the rear end of another westbound car, which was owned and operated by Sergeant Carl J. Lange of the United States Air Force (R. 4). Riding in Lange's car with him were two other Air Force sergeants, Robert F. Callaway and George F. Strong (*ibid.*). The impact forced Lange's car to go into the eastbound lane of the road where it collided with an oncoming car operated by a civilian, Angus McArthur. Sergeant Callaway received injuries from which he died about one hour after the accident. McArthur was seriously injured (R. 4-5).

At the time of the accident, Callaway and the other two Air Force sergeants were traveling under orders from Ellsworth Air Force Base, South Dakota, to the

Boeing Aircraft Plant at Seattle, Washington, for the purpose of attending, as temporary duty, a training school at the plant (R. 17-18). The sergeants were assigned to duty at Ellsworth Air Force Base as mechanics, and the sole purpose of their making the journey to Seattle was to receive training with respect to a new model of aircraft that was to be received at Ellsworth (R. 16-18). Upon completion of their six-week training course, the men were to return to their permanent station at Ellsworth (R. 7, 18).

The airmen's orders did not direct the utilization of a particular mode of transportation and, accordingly, they were authorized to proceed to Seattle in Lange's private automobile, as they did (R. 7, 15). Since their travel to Seattle was being undertaken in connection with their military duties, they were entitled to be reimbursed for their transportation expenses at the rate of five cents per mile and to receive a per diem allowance. Joint Travel Regulations for the Uniformed Services, para. 4203(3)(a), para. 4204 (5) (Appendix, *infra*, pp. 13-15).

As a result of Callaway's death while he was in military service, the United States Veterans Administration awarded to the sergeant's family substantial veterans' benefit payments, including Dependency and Indemnity Compensation.[2] In order to recover dam-

[2] The information concerning the nature and extent of the award of veterans' benefits by reason of Callaway's death is contained in a letter from the Veterans Administration to the Civil Division of the Department of Justice, which is reprinted in the Appendix, *infra*, at pp. 15-17. This letter is also set forth in the government's brief in the court below, at pages 25-27.

ages from the United States in addition to the administrative benefits, petitioner Callaway, individually (as Sergeant Callaway's widow) and as mother and next friend of her minor children, brought the present suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (*supra*, p. 2), and against Garber, alleging that Callaway's death had been caused by Garber's negligent driving while he was within the scope of his employment by the government. Petitioner Sorenson was appointed administrator of Callaway's estate, and he brought a similar suit against the United States and Garber. Angus McArthur filed an action against Garber, the United States, and Lange. All of these suits were brought in the United States District Court for the District of Montana and were consolidated for trial.

The district court held that Garber had been acting in the scope of his employment as a Navy Recruiter at the time of the accident. However, it denied recovery against the United States in the suits brought by petitioners on the ground that Callaway's death had arisen out of activity incident to his military service (Pet. App. ii).[3] In this connection, the district court noted that, at the time of his death, Callaway was acting "in line of duty for the United States Air Force," that "he was not on furlough" but "was trav-

[3] McArthur, the civilian driver of the third automobile, was awarded a recovery of approximately $30,000 against the United States. This judgment has been paid by the government. McArthur's action was dismissed with respect to the defendants Garber and Lange, and petitioners' actions were dismissed with respect to defendant Garber. Garber's liability was not in issue in the court below, nor is it in issue here.

cling along the highway under compulsion of orders from his commanding officer, and he was on a military mission as a result of those orders" (Pet. App. i, ii-iii). In dismissing the complaints, the court relied on this Court's decision in *Feres* v. *United States*, 340 U.S. 135, in which it was held that the government is not liable under the Federal Tort Claims Act for service-incident injuries or deaths of servicemen (Pet. App. i-v).

On petitioners' appeal, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. vii-xii). That court, in affirming the district court's finding that Callaway's death, while he was performing directed travel, had been incident to military service, stated:

> The queston is: did the injury to Callaway arise out of or in the course of activity incident to service? His travel at the time of the injury was incident to service. Without travel he could not respond to the orders of his superior. The objective of the orders was to provide training. The place where that training was to be provided was at a distance from his base. The travel was as much a part of his duty as the training itself. (Pet. App. x.)

ARGUMENT

1. In *Feres* v. *United States*, 340 U.S. 135, 146, this Court ruled that the United States is not liable under the Federal Tort Claims Act for injuries or deaths of servicemen that "arise out of or are in the course of

activity incident to service." Petitioners, while recognizing the force of this firmly established and consistently reapplied rule,[4] seek to escape its impact by arguing that the activities involved in the present litigation were not in fact incident to Sergeant Callaway's service. The short answer to this argument is that both courts below, in reviewing the evidence, found that the serviceman's death did in fact result from activities that were incident to his military service. There is no warrant for still further review here of those concurrent and dispositive factual findings, which have abundant support in the record.

The critical facts are not disputed. Callaway's orders directed him to proceed from Ellsworth Air Force Base to the Boeing plant in Seattle in order that he might perform the military duty of attending a training school there (R. 7). Callaway and the other airmen with whom he was riding were in the process of driving to Seattle at the time of the ac-

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[4] This Court's decision in *Feres* handed down over ten years ago, has been reaffirmed on many occasions. See, e.g., *United States* v. *Brooks*, 348 U.S. 110, 113 (1954), where the Court stated: "We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." See, also, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *Johansen* v. *United States*, 343 U.S. 427, 432 (1952). The lower courts throughout the country, including the court below in the present case, have consistently applied the *Feres* rule. See, e.g., *Norris* v. *United States*, 229 F. 2d 439 (C.A. 2), affirming 137 F. Supp. 11, on the district court's opinion; *Odlum* v. *United States*, 239 F. 2d 850 (C.A. 6); *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942 (C.A. 9), certiorari denied, 350 U.S. 837; *Zoula* v. *United States*, 217 F. 2d 81 (C.A. 5); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *United States* v. *United Services Automobile Ass'n*, 238 F. 2d 364 (C.A. 8).

cident (R. 8), and they were making the journey for the sole purpose of complying with their orders and of fulfilling their military mission (R. 16). On these facts, it seems clear that the accident that befell Callaway arose directly out of his military service. It was his status as a serviceman traveling under orders that placed him in the "zone of special danger," cf. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-07, and his death under these circumstances was plainly an incident of his military service within the *Feres* doctrine.

The fact that Callaway and the other airmen were making the trip to Seattle by private automobile does not lead to a contrary conclusion. Their orders left them free to select whatever form of transportation they desired, and they were thus authorized to utilize their private automobile (R. 7, 9, 11). But the fact that they chose that form of transportation rather than, say, commercial transportation did not convert the trip into a personal mission undertaken by the airmen for their own benefit. The journey to Seattle was travel in connection with temporary duty, so that Callaway and the other airmen were entitled to reimbursement for traveling expenses irrespective of the mode of transportation they employed. Joint Travel Regulations for the Uniformed Services, para. 4203, 4204 (Appendix, *infra*, pp. 13-15). It was a journey necessitated by their military employment, and the perils of the journey — whether it was undertaken by train, airplane or private automobile — were perils incident to that employment.

2. The conflicts petitioners assert with several other

decisions are illusory. Thus, in *Brooks* v. *United States*, 337 U.S. 49, recovery was allowed under the Federal Tort Claims Act only because, as the Court pointed out in its later *Feres* decision, Brooks was "on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. 135, 146. Callaway, however, was injured while traveling to Seattle, *under compulsion of orders and on a specific military mission*.

Nor is there any conflict with *United States* v. *Brown*, 348 U.S. 110. There, the Court held that allegedly negligent treatment received in a Veterans Administration hospital by a veteran, after his discharge, had not been sustained as an incident of his military service. The Court emphasized that (348 U.S. 110, 112), "[t]he injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." Callaway, of course, was on active duty and subject to military discipline when he was killed.

Similarly, *Baer* v. *United States*, 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974, and *Knecht* v. *United States*, 242 F. 2d 929 (C.A. 3), present no conflict with the present decision. Indeed, in *Baer*, as petitioners recognize (Pet. 10), the injury was held to be service-incident and hence not actionable under the Federal Tort Claims Act. In *Knecht*, relief was granted under the Act because, as in *Brooks*, the injured serviceman had been on leave or furlough at the time of the accident. Callaway, however, was not on furlough or

pass, engaged in his own pursuits at the time of his death. He was on official travel status, performing functions directed by his commanding officer.

3. Petitioners' reliance (Pet. 10-11) on *Chapin* v. *United States*, 258 F. 2d 465 (C.A. 9), certiorari denied, 359 U.S. 924, rehearing denied, 359 U.S. 976, is also misplaced. That case involved the concept of "within the scope of employment" for purposes of the doctrine of *respondeat superior*,[5] and it has no bearing on the question of whether a serviceman's injury was incident to his military service. As the court below correctly observed, the "incident to service" test "is a much broader test than the 'scope of employment' test used for respondeat superior purposes" (Pet. App. xi).

The "incident to service" test (concerned as it is with the relationship between employee's injuries and the conduct of the employer's business) is analogous to the concept of "course of employment," which was developed in connection with workmen's compensation. While the theory of *respondeat superior* is that an employer is vicariously liable for third-person injuries only by reason of acts directly furthering the employer's conduct of his business, the workmen's compensation doctrines uniformly reflect a broader interpretation consistent with the social purpose underlying workmen's compensation legislation. Thus, this Court has recognized that workmen's com-

[5] The *Chapin* case decided that, under the law of California, a soldier who utilized his own automobile to effect a permanent change of station and collided with the plaintiffs on the highway was not within the scope of his employment at the time so as to make the government liable under the Federal Tort Claims Act on the principle of *respondeat superior*.

pensation concepts of "course of employment" are not confined by common-law notions of "scope of employment," *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-07.[6]

Accordingly, there is no basis for making the *Feres* doctrine in any way dependent upon the more rigorous standards applicable in determining *respondeat superior* liability. However, even if it was, it is interesting to note that, within the context of the *respondeat superior* liability cases, there is ample authority for the proposition that Callaway's death on the highway was directly related to his employment. See, *e.g.*, *Webster* v. *Mountain States Tel. & Tel. Co.*, 108 Mont. 188, 89 P. 2d 602; *Hinson* v. *United States*, 257 F. 2d 178 (C.A. 5); *United States* v. *Mraz*, 255 F. 2d 115 (C.A. 10); *Cooner* v. *United States*, 276 F. 2d 220 (C.A. 4).

4. One further point must be noted. In closing, the petition urges that the result below has the unjust effect of denying Sergeant Callaway's family redress against the United States for his death (Pet. 12-13). But Veterans Administration files show that Sergeant Callaway's family has been receiving veterans' benefits in substantial amounts from the federal government by reason of his death. (Appendix, *infra*, pp. 15-17). These administrative benefits, made available under the statutory system for compensating servicemen and their dependents for service-caused injuries and deaths,

[6] See also *Conversions & Services, Inc.* v. *Roach*, 204 F. 2d 499, 501 (C.A. 1) (Magruder, J.): "The liability of an employer to pay workmen's compensation to an injured employee, and the liability of an employer to a third person on the doctrine of *respondeat superior*, depend upon entirely distinct considerations."

compare "extremely favorably" with those provided by "most workmen's compensation statutes." See *Feres* v. *United States*, 340 U.S. 135, 145. Just as the provisions for workmen's compensation benefits typically relieve the private employer from any further liability for the death or injury to his employee even though the injured employee might have been able to obtain a slightly greater recovery by suit if he could establish the employer's negligence, the analogous and fully as generous benefits available to servicemen and their dependents for the servicemen's injuries or deaths relieve the United States of any additional liability. Thus restricting servicemen or their dependents to the benefits of the military and veterans laws cannot be viewed as unfair or discriminatory. *Feres* v. *United States*, 340 U.S. 135; *Johansen* v. *United States*, 191 F. 2d 162 (C.A. 2), affirmed, 343 U.S. 427, for such relief is not subject to the uncertainties, expense and delay of establishing negligence, but is guaranteed through direct, administrative payments.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
MARK R. JOELSON,
Attorneys.

SEPTEMBER, 1961.

APPENDIX

1. Joint Travel Regulations for the Uniformed Services (as effective 3-1-57):

Part E: Temporary Duty Allowances in the United States

4200 General
(Ch. 13)

Unless otherwise specifically provided for or restricted in these regulations, the per diem allowances prescribed in this Part are applicable for all periods of temporary duty and travel in connection therewith, including but not limited to the following:

1. periods of necessary delay awaiting further transportation.
2. periods of delay at ports of embarkation and debarkation in connection with a permanent change of station.
3. periods of temporary duty directed in a permanent change of station order.

* * * * *

4203 Transportation
(Ch. 44)

* * * * *

3. Monetary Allowance in Lieu of Transportation

a. *Travel at Personal Expense.* Except as provided in subpar. b, when authorized travel is performed at personal expense, the member will be reimbursed a monetary allowance in lieu of trans-

portation at the rate of five cents per mile for the official distance.

b. *Travel by Privately Owned Conveyance*

(1) *Policy.* It is the policy of the uniformed services to "authorize" (as distinguished from "permit") members to travel by privately owned conveyance whenever such mode of transportation is acceptable to the member and is determined to be more advantageous to the Government. This determination should be based on the facts in each individual case and authorization should not be granted unless the order-issuing authority is convinced that such mode of travel is clearly more advantageous to the Government than travel by Government conveyance or public carrier. The advantage gained by the Government may be, for example, a more efficient, economical, or expeditious accomplishment of Government business, short trips over routes where commercial transportation is nonexistent or would be so time-consuming as to unduly delay public business.

* * * * *

4204 TIME ALLOWABLE IN COMPUTATION OF PER DIEM
(Ch. 13)

* * * * *

5. TRAVEL BY PRIVATELY OWNED CONVEYANCE. When travel orders specifically state that travel by privately owned conveyance is more advantageous to the Government, per diem allowances are payable for the actual time necessary to perform the directed travel. When travel orders do

not contain such statement, the rate of per diem applicable and the period for which per diem is payable for travel by privately owned conveyance shall be for the time actually consumed and at the rate applicable for travel by privately owned conveyance, the total amount payable not to exceed that payable for constructive travel by common carrier over the official route.

* * * * *

2. Letter from Veterans Administration to the Department of Justice.

V.A. SEAL

VETERANS ADMINISTRATION
Office of General Counsel
WASHINGTON 25, D. C.

SEP 14 1960

YOUR FILE REFERENCE:
IN REPLY REFER TO: 023B

Mr. George Cochran Doub
Assistant Attorney General
Civil Division
Department of Justice
Washington 25, D. C.

Attention: Chief, Appellate Section

Re: CALLOWAY, ROBERT F. XC-7 244 414

Dear Mr. Doub:

This refers to your informal request for a statement of benefits paid under veterans' laws on account of the death of the above-named veteran on May 3, 1957.

A copy of the "Enlisted Record and Report of Separation, Honorable Discharge", contained in the veteran's file, indicates that he first entered active Federal service with the National Guard on September 16, 1940; that he was discharged and reenlisted on September 20, 1941, at Camp Barkeley, Texas, and was separated on November 26, 1945, for the convenience of the Government. This form also contains the entry "4 years 10 months 25 days" under the heading "Prior Service". The file shows subsequent enlistments in the U.S. Air Force on April 19, 1946, April 19, 1949, June 14, 1950, and January 5, 1955 (for six years).

The Veterans Administration file reflects that the veteran was married to Ola Pearl Blair in San Antonio, Texas, on August 23, 1944; that Robert F. Calloway, Jr., was born of such marriage on April 7, 1945; that Sandra Kays Calloway, a daughter, was born on April 26, 1948; that another child, Richard Eliott Calloway, was born on April 3, 1955; that at the time of the veteran's death $10,000 National Service Life Insurance on the ordinary life plan was in effect under insurance number 3V 1912 58 91; that his wife, Ola Pearl Calloway, was the beneficiary of such insurance; that Ola Pearl Calloway filed a claim for such insurance on May 16, 1957; that she selected payment in 84 installments, and that such installments in the amount of $131.60 each have been paid commencing with the date of the serviceman's death and monthly thereafter. The final installment will be due on April 3, 1964.

The Veterans Administration file further reflects that pursuant to the claim of Mrs. Ola Pearl Calloway filed with the Veterans Administration on May 16, 1957, Dependency and Indemnity compensation was awarded to her in monthly installments of $149, predi-

cated upon a base pay of $304.20 (Grade E-7, M Sgt.), commencing May 4, 1957, under the provisions of Public Law 881, 84th Congress (now codified as subchapter II of chapter 13, Title 38, United States Code); that she continued to receive such benefits to June 1, 1958, when the amount was increased to $154 per month, predicated upon base pay of $350 a month for a serviceman with over 20 years' service (Public Law 85-422, May 20, 1958).

We trust that the above is the information which you desire; however, if you desire an authenticated statement of benefits paid, we will be glad to furnish such statement, upon request.

Very truly yours,

s W. C. Pickett,
WILBUR C. PICKETT,
Director, Litigation Service
For the General Counsel.